

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

MANMOHAN DHILLON et al.,

Plaintiffs and Appellants,

v.

ANHEUSER-BUSCH, LLC et al.,

Defendants and Respondents.

F074952

(Super. Ct. No. 14CECG03039)

**OPINION**

APPEAL from an order of the Superior Court of Fresno County. Alan M. Simpson, Judge.

Hulett Harper Stewart, Dennis Stewart; Coleman & Horowitt, Darryl J. Horowitt and Sherrie M. Flynn for Plaintiffs and Appellants.

Wanger Jones Helsley, Oliver W. Wanger, Patrick D. Toole; Cadwalader, Wickersham & Taft, Peter E. Moll and Brian D. Wallach for Defendant and Respondent Anheuser-Bush, LLC.

Chielpegian Cobb and Mark E. Chielpegian for Defendant and Respondent Donaghy Sales, LLC.

-ooOoo-

Plaintiffs appeal from the denial of their motion for class certification. They contend the trial court erroneously determined their proposed class was unascertainable by looking at the allegations of their pleading and the content of their experts' reports, rather than solely at the class definition proposed in their motion. We conclude substantial evidence supported the trial court's findings and it did not incorrectly apply the law in determining the issue of ascertainability. Accordingly, we affirm the order.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiffs filed this action on behalf of themselves and a class of persons similarly situated. They appeal from the denial of their motion for certification of the class. The operative pleading, the second amended complaint, alleged the following: Plaintiffs and the class they seek to represent own and operate retail convenience stores in Fresno and Madera counties, and sell beer manufactured by defendant, Anheuser-Busch, LLC (Anheuser-Busch) and distributed by defendant, Donaghy Sales, LLC (Donaghy). California law requires wholesalers of beer to sell to retailers on a nondiscriminatory basis and to charge only the prices filed with the Department of Alcoholic Beverage Control (ABC). A wholesaler may not charge a special price to a particular customer. The wholesaler's schedule of prices may be modified by filing a new or amended schedule of prices with the ABC.

Plaintiffs alleged that, in violation of the wholesale beer pricing and unfair competition laws, defendants engaged in a systematic scheme to favor certain retailers over others in the pricing of beer defendants sold to them. During the class period (the four-year period preceding the filing of the complaint), Donaghy sold beer to certain retailers at effective wholesale prices that were lower than the prices filed with the ABC. It did this by providing certain "favored retailers" with disproportionately large numbers of consumer coupons, some issued by Anheuser-Busch, for discounts off the retail price of beer. Instead of providing the coupons to consumers, however, the favored retailers redeemed them themselves, not related to a particular sale of beer to a consumer as

required by the coupons. They redeemed the coupons by presenting them to Donaghy for credit against a subsequent purchase of beer, by redeeming them through a third-party redemption center, or, if in the form of a check, by depositing the check in the retailer's bank account. Some aspects of the scheme were known to "non-favored retailers," who were provided "comparatively insignificant numbers of coupons," but the full extent of the scheme was concealed from the named plaintiffs and the proposed class. Defendants also sometimes dictated retail prices to retailers, requiring nonfavored retailers to sell beer at prices above those of favored retailers.

Plaintiffs alleged that, as a result of this scheme, favored retailers who received the coupons effectively paid wholesale prices below the prices filed with the ABC, and lower than the prices paid by nonfavored retailers, giving them an unfair competitive advantage. Plaintiffs alleged four causes of action: (1) unlawful business practices (Bus. & Prof. Code, § 17200 et seq.); (2) unfair business practices, including allegations of incipient violation of antitrust law (Bus. & Prof. Code, § 17200 et seq.); (3) secret payment or allowance of rebates (Bus. & Prof. Code, § 17045); and (4) soliciting or participating in a violation of the unfair competition laws (Bus. & Prof. Code, §§ 17047, 17048).

Plaintiffs filed a motion for class certification. The class definition used in the motion differed from the definition set out in the second amended complaint. Defendants opposed the motion. The trial court denied the motion, concluding plaintiffs failed to demonstrate the existence of an ascertainable class. Plaintiffs appeal that order.

## **DISCUSSION**

### **I. Standard of Review**

"The denial of certification to an entire class is an appealable order." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) "On review of a class certification order, an appellate court's inquiry is narrowly circumscribed. 'The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: "Because trial

courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification.” [Citation.] A certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions.’ ” (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1022.) “We must ‘[p]resum[e] in favor of the certification order ... the existence of every fact the trial court could reasonably deduce from the record.’ ” (*Ibid.*)

“[A]ppellate review of orders denying class certification differs from ordinary appellate review. Under ordinary appellate review, we do not address the trial court’s reasoning and consider only whether the result was correct. [Citation.] But when denying class certification, the trial court must state its reasons, and we must review those reasons for correctness.” (*Hendershot v. Ready to Roll Transportation, Inc.* (2014) 228 Cal.App.4th 1213, 1221.) In reviewing “an order denying class certification, we consider only the reasons cited by the trial court for the denial, and ignore other reasons that might support denial.” (*Bufile v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1205 (*Bufile*).)

## **II. Standards for Class Certification**

“Code of Civil Procedure section 382 authorizes class actions ‘when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court ....’ The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. [Citations.] The ‘community of interest’ requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.” (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*).) “In addition, the assessment of suitability for class certification entails addressing whether a class

action is superior to individual lawsuits or alternative procedures for resolving the controversy.” (*Bufile*, *supra*, 162 Cal.App.4th at p. 1204.) “The certification question is ‘essentially a procedural one that does not ask whether an action is legally or factually meritorious.’ ” (*Sav-On*, *supra*, 34 Cal.4th at p. 326.)

A plaintiff seeking class certification bears the burden of satisfying the requirements for certification, including the element of ascertainability. (*Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 154.) Pleadings are not evidence and cannot satisfy the plaintiff’s evidentiary burden. (*Ibid.*) The trial court may consider the totality of the evidence, including evidence presented by the defendant, in determining whether the plaintiff has established the elements required for class certification. (*Ibid.*)

### **III. Ascertainable Class**

“ ‘A class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description.’ [Citations] ‘Ascertainability is achieved “by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary.” ’ [Citations.] ‘Whether a class is ascertainable is determined by examining (1) the class definition, (2) the size of the class, and (3) the means available for identifying class members’ at the remedial stage.” (*Aguirre v. Amscan Holdings, Inc.* (2015) 234 Cal.App.4th 1290, 1299–1300 (*Aguirre*).)

#### **A. Class definition**

The definition of the class in the original complaint, the first amended complaint, and the second amended complaint was as follows:

“All persons who own retail business establishments in Fresno and Madera Counties where that retail business establishment, or if the person owns

more than one such establishment at least one of those establishments, is of a physical size not exceeding 5,000 square feet ('Convenience Store') and purchased from Defendant Donaghy beer manufactured and/or sold by Defendant Anheuser-Busch during the period from four years prior to the filing of this Complaint to the date of the filing of this Complaint (the 'class period'), excluding persons identified in this Complaint as co-conspirators with Defendants Donaghy and Anheuser-Busch and any co-conspirators subsequently identified after the filing of this Complaint."

In their motion for class certification, plaintiffs changed the definition of the class they wished to have certified. The definition presented in the motion was as follows:

"All persons who own retail business establishments in Fresno and Madera Counties classified in the Donaghy sales database within one of the following channel descriptions and channel id numbers ('Cid#'): a) Convenience/Cid#190; b) Oil and service/Cid#195; c) Grocery/Cid#265; d) Gas and convenience/Cid#294; e) Package liquor/Cid#290; f) Mom and Pop/Cid#175; g) Deli/Cid#180; h) Bodega/Cid#185; and i) Package Liquor/Cid#290 and which purchased from Defendant Donaghy beer manufactured and/or sold by Defendant Anheuser-Busch during the period from October 10, 2010 through December 31, 2014 excluding Vikram and Vinay Vohra and Hardeep Singh and all entities owned, controlled by or affiliated with any of them."

## **B. Trial court's ruling**

In its ruling, the trial court first noted the difference between the class definition proposed in the motion for class certification and the class definition included in the second amended complaint. It stated plaintiffs had not explained the reason for the change, such as by identifying new facts revealed during discovery that justified the change or indicated it was a more precise definition. The second amended complaint named only Vikram and Vinay Vohra, and the stores they owned or operated, as retailers excluded from the class. The class definition proposed in the motion for class certification also excluded Hardeep Singh. The trial court stated plaintiffs added Singh as a "favored retailer" and "co-conspirator" who was excluded from the class, but did not explain how they determined he fell within that description. Further, plaintiffs offered no

evidence regarding how they determined that the Vohras and Singh, and no others, conspired with defendants in the alleged couponing scheme.

In support of their motion for class certification, plaintiffs presented the reports of two experts, accountant Marianne DeMario and economist J. Douglas Zona. The trial court observed plaintiffs' experts appeared to work backwards, starting with a class of all retailers included in the specified sales channels of Donaghy's database, then excluding certain identified individuals or retailers as "favored retailers" or "co-conspirators." There were no objective criteria used to define "favored retailers"; they were simply selected by plaintiffs' attorneys. Plaintiffs' counsel gave lists of favored retailers, overlapping but not identical, to their experts. DeMario admitted that seven of the 300 retailers whose coupon data she reviewed received more coupons than the average received by the favored retailers on her list. The trial court concluded DeMario's results would have been different if they had been based on the larger list of favored retailers given to Zona, or if she had included as favored retailers the seven retailers with higher average percentages of coupons than the favored retailers on her list.

The trial court determined the class was either unascertainable or ascertainable only based on a case-by-case reference to Donaghy's business records and "some other unknown and unidentified criteria to determine who allegedly conspired with Defendants." It noted: "Nowhere in Plaintiffs['] papers is there a mention or attempt to explain how the list of 'favored retailers' came about." It concluded "[p]laintiffs ... failed to demonstrate the existence of an ascertainable class by failing to identify the means available for identifying class members without unreasonable time by reference to official records."

### **C. Precision of definition**

One of the requirements of a class definition is that it be precise. (*Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 858.) The original definition of the class described its members as retail business establishments of

a certain size that purchased beer from defendants during the class period, excluding coconspirators of defendants. The second amended complaint repeatedly referred to the businesses as “convenience stores.” Plaintiffs contend they were entitled to use a more precise definition in the motion. They presented no evidence, however, that the definition proposed in the motion for class certification was more precise than the one included in the second amended complaint.

The motion’s proposed class definition identified the class in terms of classifications (channel descriptions and channel id numbers) contained in Donaghy’s sales database. Until they filed their reply papers in the trial court, plaintiffs did not explain the meaning or significance of the “channel descriptions” or “channel id numbers” in Donaghy’s sales database. The reply report of plaintiff’s accounting expert, Marianne DeMario, explained there was no easy way to identify the class members using the class definition found in the complaints. Plaintiffs’ counsel asked her to “identify the relevant channels in the Donaghy sales database that most closely approximated the type of retail establishments represented by the Named Plaintiffs and Favored Retailers, which in general parlance would likely be understood as ‘convenience stores.’ ” DeMario gave a general definition of the term “convenience store,” but did not explain how she determined which of Donaghy’s categories corresponded to that definition. She provided no evidence of Donaghy’s definitions of those categories. She did not explain whether she obtained definitions from Donaghy, or simply chose the categories based on the titles and her assumptions of what they should include. DeMario did not explain how she determined these categories corresponded to “convenience” stores of the size described in the original class definition.

DeMario also asserted that, “[w]ith very limited exceptions (i.e. a handful of identifiable accounts which appear to be large chains),” the stores in the categories listed in the motion’s class definition “would be understood as ‘convenience stores.’ ” Thus, she admitted the class definition plaintiffs sought to have certified included some large

chain stores that were not within the class as defined in the second amended complaint. She did not provide detailed factual information concerning the number of such large chain stores that were included in the designated classifications, why they should be included in the class, or why they were not excluded from the class definition. Consequently, plaintiffs failed to demonstrate the class definition in the motion described the same class as the one proposed in the second amended complaint, but with more precision.

“ ‘The goal in defining an ascertainable class “is to use terminology that will convey ‘sufficient meaning to enable persons hearing it to determine whether they are members of the class plaintiffs wish to represent.’ [Citation.] ‘... Otherwise, it is not possible to give adequate notice to class members or to determine after the litigation has concluded who is barred from relitigating.’ ” ’ ” ( *Nicodemus v. Saint Francis Memorial Hospital* (2016) 3 Cal.App.5th 1200, 1212.) Defining the class in terms of Donaghy’s sales categories would not appear to “enable persons hearing [the definition] to determine whether they are members of the class.” ( *Ibid.*)

#### **D. Common objective characteristics and transactional facts**

When the class, as defined, “describes a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description, and the plaintiff has proposed an objective method for identifying class members when that identification becomes necessary, there exists an ascertainable class.” ( *Aguirre, supra*, 234 Cal.App.4th at p. 1306.) In ruling on the motion for class certification, the trial court appeared to be concerned with the ever-shifting or entirely absent definition of the common characteristics of the class and of those excluded from the class. More specifically, it appeared to be concerned with the lack of objective criteria for distinguishing between “favored retailers” and “non-favored retailers” (i.e., class members), and between favored retailers who were allegedly coconspirators and those who were not. Plaintiffs contend these distinctions were

irrelevant, because the definition of the class proposed in the motion did not mention any of those terms, but simply excluded individuals by name and their unnamed businesses by association with them. The trial court discussed the categories of favored retailers, nonfavored retailers, and coconspirators, however, because they figured prominently in the allegations of the second amended complaint, they were the basis of the analyses of the experts whose testimony was presented on behalf of plaintiffs, and they appeared to be the basis for the exclusion of the named individuals. Contrary to plaintiffs' contention, randomly excluding by name persons who would otherwise be included in the class does not result in an objectively identifiable class. It creates an entirely subjective exclusion of certain potential members from the class.

The original class definition, as set out in the second amended complaint, excluded:

“persons identified in this Complaint as co-conspirators with Defendants Donaghy and Anheuser-Busch and any co-conspirators subsequently identified after the filing of this Complaint. Such additional co-conspirators will be identified prior to the certification of the Class.”

Thus, the second amended complaint identified the persons to be excluded as coconspirators with defendants. It identified two individuals, the Vohra brothers, as alleged coconspirators. The motion added a third excluded person, Singh. Nowhere in the pleadings or in the motion for class certification did plaintiffs explain how they determined the specified individuals, and no others, were coconspirators with defendants. They provided no criteria and no evidence to support that determination. Thus, the exclusion of the Vohra brothers and Singh is an unexplained, entirely subjective choice on the part of plaintiffs or their counsel.

The second amended complaint alleged defendants misused coupons “by providing them on a discriminatory basis to certain favored retailers,” to provide the favored retailers with discounted prices for defendants' beer. The “discriminatory and secret rebates resulted in favored retailers who received coupons paying wholesale prices

which were below the prices filed with the ABC and which were paid by the non-favored retailers, members of the proposed class.” Favored retailers received disproportionate numbers and amounts of coupons. Defendants effectively lowered their wholesale prices to “a few hand-picked retailers,” with the agreement or expectation that the favored retailers would lower their retail prices in unfair competition with other retailers. The favored retailers often sold at retail below the filed wholesale price, forcing the nonfavored retailers (the class members) to match or attempt to match the prices of the favored retailers, or risk losing sales and customer good will.

The second amended complaint alleged Vinay and Vikram Vohra were brothers who operated convenience stores and were favored retailers. “They knowingly accepted large numbers of coupons and used those to compete unfairly, including pricing at retail below the filed wholesale prices, in active cooperation with the Defendants.” On information and belief, plaintiffs alleged there were “others who are favored retailers and thereby joined in concert with Defendants,” and plaintiffs would identify them as favored retailers when information was available.

Despite these allegations distinguishing “favored retailers,” who received disproportionate quantities of coupons lowering their wholesale beer prices, from “non-favored retailers” (class members), and suggesting the favored retailers acted in concert with or conspired with defendants, the class was not defined in those terms. The second amended complaint did not even define the class in terms of receipt or use of defendants’ coupons. For example, the class was not limited to retailers who purchased from defendants beer products that were subject to coupon promotions. The class was defined to include all retail businesses of a certain physical size that purchased beer from defendants during the class period, excluding only two named alleged coconspirators.

In their motion for class certification, plaintiffs again discussed their claims in terms of favored and nonfavored retailers. They acknowledged that some nonfavored retailers and class members received coupons from defendants. “Some of the non-

favored retailers received some coupons but systematically any provision of coupons to the non-favored class members was disproportionately smaller in number and value than the coupons provided to the favored retailers.” Although plaintiffs proposed a new class definition, it still was not limited to purchasers of beer products that were subject to coupon promotions. It also still did not reflect the distinction between “non-favored” retailers who received either no coupons or a disproportionately small number and value of coupons, and favored retailers who received a disproportionately large number and value of coupons. The definition excluded only three persons by name.

The expert reports presented by plaintiffs in support of the motion for class certification analyzed plaintiffs’ claims in terms of “favored” and “non-favored” retailers. The report of plaintiff’s accountant, DeMario, presented her methodologies for calculating the damages of the proposed class. She described her understanding that defendants distributed “hundreds of thousands of coupons” during the class period, but the named plaintiffs and the class “received relatively few of these coupons” and a disproportionate number compared with more favored retailers. She listed the 23 retailers she understood to be the favored retailers; confusingly, her reply declaration included a list of only 18 favored retailers.

Plaintiffs’ economist, Zona, described his understanding of plaintiffs’ claims, noting plaintiffs alleged a scheme of rebates implemented through the misuse of coupons, which effectively provided discounts from wholesale prices only to favored retailers who received disproportionate numbers and amounts of coupons. He concluded defendants’ couponing scheme resulted in differential prices to favored and nonfavored retailers, which injured competition in the convenience store market; all or nearly all of the class members were affected, and proof of their injury could be made on a class-wide basis using common evidence. Zona noted that the Vohra brothers, “among others,” were favored retailers. He included a full list of the 35 retailers he understood were favored

retailers in an appendix to his report. Zona's list included a number of retailers not included in DeMario's list, and excluded some that did appear in DeMario's list.

Plaintiffs' responses to interrogatories contained a list of 22 businesses, in addition to the three individuals (Vikram Vohra, Vinay Vohra, and Hardeep Singh), as favored retailers. The interrogatory list overlaps Zona's and DeMario's, but contains some stores that do not appear on either expert's list.

Neither DeMario nor Zona determined which retailers should be defined as "favored"; rather, they received lists of favored retailers from plaintiffs' counsel and were told to assume in their work that the listed retailers were the favored retailers. If the retailer was not classified as a favored retailer, it was a member of the class. Plaintiffs presented no evidence explaining how their counsel arrived at the conclusion the listed retailers, and no others, constituted the favored retailers. Plaintiffs have not presented any objective criteria that they used to identify the listed retailers as favored. They have not explained why, if they have identified anywhere from 18 to 35 favored retailers, only three named individuals and their business entities have been excluded from the class in their proposed definition.

DeMario described two methods of calculating class damages or restitution, the measure of which she described as the "overcharge," or "the difference between the actual amount paid by the Named Plaintiffs and the Class for beer sold and distributed by Defendants during the Class Period and the amount the Named Plaintiffs and Class would have paid if they had received the discounts provided to the Favored Retailers, reflected by the coupons received by them, less any coupons received by the Class." She calculated the class (nonfavored retailers) received a weighted average discount from the use of coupons of 1.46 percent and the favored retailers received a weighted average discount of 6.12 percent. Thus, her calculation of damages depended upon which retailers she categorized as "favored," the quantity of beer products those retailers purchased from defendants during the class period relative to the quantity purchased by

the nonfavored retailers, and the quantity of coupons the favored retailers received and redeemed relative to the quantity the nonfavored retailers received and redeemed.

Plaintiffs' claims were based on allegations that the favored retailers received disproportionately large numbers of coupons, which allegedly resulted in larger discounts to the favored retailers than to the nonfavored class members. Logically, on that theory, the favored retailers would be those who received the greatest numbers of coupons and the greatest discounts off the wholesale price of defendants' beer. DeMario, however, admitted that, out of approximately 300 retailers for which she had coupon redemption data,<sup>1</sup> seven class members had a higher discount rate than the 6.12 percent received by those plaintiffs categorized as favored retailers. DeMario referred to these seven as "outliers," stated they had no impact on her opinion, and denied their use in forming her opinion was illogical or inconsistent with plaintiffs' claims. She asserted that, "in the aggregate, there was a clear and substantial disparity between the discounts received by the Favored Retailers and those received by the Class." Nonetheless, she failed to specify any objective criteria by which she distinguished between the two groups.

Plaintiffs' action is based on claims they and the class they seek to represent were disadvantaged relative to favored retailers in the wholesale price of beer purchased from defendants. The second amended complaint also refers to the individuals and businesses excluded from the class as coconspirators. Although plaintiffs' experts defined the class as nonfavored retailers, plaintiffs failed to attempt to define a class that excluded either favored retailers or coconspirators by providing objective criteria for doing so. Plaintiffs seem to believe that, by identifying particular individuals as excluded, they are providing objective criteria sufficient to define the class. We do not believe that counsel's apparently random, and certainly unexplained, selection of individuals to exclude from

---

<sup>1</sup> Plaintiffs estimated the class, as defined in the motion for class certification, included approximately 800 members.

the class, without specification of any objective criteria for their selection and exclusion, satisfies the requirement that, in order to be ascertainable, the class must be defined “in terms of objective characteristics and common transactional facts.” (*Aguirre, supra*, 234 Cal.App.4th at p. 1300.) This is especially true when other retailers included in the definition of the class appear to share characteristics with the excluded persons that would warrant their exclusion as well (i.e., the seven retailers with higher rates of coupons redeemed than the favored retailers on DeMario’s list), and no explanation is given for failing to exclude them.

Plaintiffs cannot avoid the requirement that the class be defined “in terms of objective characteristics and common transactional facts” by substituting their own judgment concerning who should be excluded in place of objective criteria. “Trust us” does not constitute objective criteria.

Plaintiffs assert that excluding individuals from the proposed class by name is “a proper and accepted way to define the class.” They cite us to no California case in which that has been approved by any court. They cite only one federal district court case in which the trial court declined to certify a class of Honda dealers, which excluded “ ‘Defendants and Co-Conspirators,’ ” because the class definition was “too open-ended.” (*In re Honda Am. Motor Co. Dealership Rels. Litig.* (D. Md. 1997) 979 F.Supp. 365, 367, fn. 2.) The court, however, certified the class after modifying the definition to exclude “defendants, various dealers (identified by name) who plaintiffs have a good faith basis for alleging were co-conspirators, and, subject to further exploration of the issue with counsel, various dealers (again identified by name) who defendants allege were co-conspirators, provided that the alleged conspiracy existed at all.” (*Ibid.*)

Here, the proposed class definition did not indicate it excluded anyone on the basis of being a coconspirator or a favored retailer. It simply excluded named persons without explanation. Plaintiffs presented no objective criteria and no evidence supporting their exclusion of the named persons. They presented no evidence showing a good faith basis

for believing the excluded persons were coconspirators, or distinguishing their conduct from the conduct of the named plaintiffs<sup>2</sup> or the proposed class members. Although the second amended complaint alleged the Vohra brothers were coconspirators with defendants, it failed to allege any facts supporting that conclusory allegation. Thus, plaintiffs' counsel's reasons for excluding the Vohras and Singh are entirely unexplained.<sup>3</sup>

After considering the claims as alleged in the second amended complaint and discussed in plaintiffs' experts' reports, we conclude substantial evidence supports the trial court's conclusion that the class, as defined, was not sufficiently ascertainable. It was not defined "in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary." (*Aguirre, supra*, 234 Cal.App.4th at p. 1300.) As the trial court stated, the class was either unascertainable or ascertainable only by application of some unknown criteria. Additionally, the trial court did not rest its decision on improper criteria or erroneous legal assumptions. Consequently, plaintiffs have failed to demonstrate the trial court abused its discretion in denying class certification.

---

<sup>2</sup> The evidence showed that at least some of the named plaintiffs received coupons for beer purchased from defendants and redeemed them.

<sup>3</sup> Plaintiffs appear to concede that, if they had attempted to define the class in terms of "favored retailers" or "co-conspirators" it would have led to uncertainty in the definition, and this was the reason they opted to exclude certain individuals by name. Nonetheless, they failed to enlighten us as to the criteria they used for singling out these three individuals to exclude or failing to exclude everyone on their lists of favored retailers.

## **DISPOSITION**

The order denying class certification is affirmed. Defendants are entitled to their costs on appeal.

---

HILL, P.J.

WE CONCUR:

---

SMITH, J.

---

DESANTOS, J.